**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 19 June 2015**

*In the Matter of:*

**NEW YORK CITY DEPARTMENT OF EDUCATION,**
*Employer,*

*on behalf of*

**JESUS MARIA DURAN MELO**

*Alien.*

**BALCA Case No.: 2012-PER-02753**
ETA Case No.: A-11137-78681

Certifying Officer: William Carlson, Ph.D.
Atlanta National Processing Center

Appearance: Helen L. Konrad, Esq.
McCandlish Holton
Richmond, Virginia
*For the Employer*

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
*For the Certifying Officer*

Before: **Geraghty, Calianos, McGrath**
Administrative Law Judges

**COLLEEN A. GERAGHTY**
Administrative Law Judge

# DECISION AND ORDER
# REVERSING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). For the reasons set forth below, we reverse the denial of the Employer's Application for Permanent Employment Certification.

## BACKGROUND

On May 24, 2011, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "English as a Second Lang[uage] Teacher (ESOL)." (AF 798, 805).[1] On July 15, 2011, the CO issued an Audit Notification Letter, requiring the Employer to submit documentation pursuant to 20 C.F.R. § 656.20, including a recruitment report. (AF 793-96). On August 16, 2011, the Employer provided documentation in response to the audit. (AF 69-792).

On January 23, 2012, the CO denied certification because the Employer failed to provide a recruitment report that accurately accounted for the actual number of applicants for the relevant job opportunity, in violation of 20 C.F.R. § 656.17(g)(1). (AF 67-68). On February 16, 2012, the Employer requested reconsideration, arguing that contrary to the CO's denial, it properly accounted for all applicants for the job opportunity. (AF 47-66).

The CO did not rule on the request for reconsideration, but rather on May 9, 2012, he issued a second denial letter, finding that the Employer's recruitment report did not provide a lawful job-related reason for rejection of U.S. applicants who appear to be willing, qualified and available. (AF 45-46). Specifically, the recruitment report stated "[e]ight candidates declined to work with the student population," but interview notes submitted on audit indicated that the applicants were available either "immediately" or "soon." (AF 46). The CO cited to 20 C.F.R. §§ 656.10(c)(9) and 656.24(b)(2) as authority for the denial.

On May 15, 2012, the Employer requested reconsideration of the second denial. (AF 3-44). The Employer first argued that the CO's failure to rule on the first motion to reconsider mandates reversal and the CO cannot issue a second denial letter identifying new reasons for denial after its initial decision to deny an application. (AF 4-5). Second, the Employer relied on a letter from Peter Ianniello, the Executive Director for the Employer, submitted with its reconsideration request, to establish the eight applicants were lawfully rejected. (AF 5-6, 42-43). Mr. Ianniello stated that the Employer has a two-step interview process; first there is an initial phone screening, then there is a second, in-person interview at the individual schools. (AF 42). Mr. Ianniello stated that the eight identified applicants had an in-person interview after their initial phone interview, and during the second interview, the applicants declined to work with the student population. (AF 43).

On June 28, 2012, the CO forwarded the case to the Board of Alien Labor Certification Appeals ("BALCA") for administrative review. (AF 1-2). The CO acknowledged the letter from Mr. Ianniello, but because the interview notes provided on audit indicated the applicants were available for the job opportunity, he upheld his denial. (AF 1).

On December 20, 2012, BALCA issued a Notice of Docketing. The Employer filed a Statement of Intent to Proceed on January 2, 2013, and filed a Statement of Position ("Er. Br.") on January 30, 2013. The CO did not file a Statement of Position.

[1] The Appeal File will be referenced by the abbreviation "AF," followed by the page number.

In its brief, the Employer stressed the eight applicants were rejected because they were not interested in the position, not because they were unavailable, and a lack of interest is a proper reason for rejecting a qualified applicant. (Er. Br. 6-7). The Employer argued that the letter from Mr. Ianniello submitted on reconsideration is not barred from evidence by Section 656.24(g)(2) because the CO's audit notification did not require documentation demonstrating the lawful reason for rejection. (Er. Br. 5, 8 n.4). The Employer further stated even if the evidence was barred by Section 656.24(g)(2), the CO chose to consider the evidence, and therefore it can be considered by BALCA on appeal. (Er. Br. 7, 8 & n.4). The Employer additionally argued that procedural errors on the part of the CO warrant reversal, including: (1) the CO never ruled on the initial motion for reconsideration following the first denial; (2) the CO improperly issued a second denial letter; (3) the CO's broad and boilerplate audit notification letter failed to comply with the regulations; and (4) the regulations cited by the CO in the second denial letter and transmittal letter do not support the CO's decision. (Er. Br. 4-5, 8-9).

On January 7, 2015, in response to a letter from this Panel, the Employer indicated that the job identified on the PERM application is still open and available and that the alien identified in the application remains ready, willing, and able to fill the position.

## DISCUSSION

An important goal of the Immigration and Nationality Act is to prevent foreign workers from obtaining permanent employment in the United States unless there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work. *See* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a)(1). Accordingly, when an employer files an application for permanent employment certification, it must certify that "[t]he job opportunity has been and is clearly open to any U.S. worker" and "the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons." 20 C.F.R. §§ 656.10(c)(8), (9).

The PERM regulations require an employer to conduct mandatory recruitment steps in a good faith effort to recruit U.S. workers prior to filing an application for permanent alien labor certification. *See* 20 C.F.R. § 656.17(e). At the end of the recruitment period, the employer must prepare a recruitment report stating the number of U.S. applicants rejected, "categorized by the lawful job-related reasons for such rejections." 20 C.F.R. § 656.17(g)(1). The CO, in determining whether labor certification should be granted, must consider whether there is an able, willing, qualified and available U.S. worker for the job opportunity. 20 C.F.R. § 656.24(b)(2).

The CO issued an audit notification on July 15, 2011. (AF 793). In the boilerplate section of the audit notification, the Employer was directed to provide "[t]he recruitment report . . . describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections." (AF 793-94). In an attachment to the audit notification, the CO additionally required:

> Please provide the resumes and applications for all U.S. workers who applied for the employer's job opportunity listed on the ETA Form 9089. In addition, please

> provide a report that lists the following information for each U.S. worker rejected for the job opportunity: the date(s) the employer contacted the U.S. worker; the date(s) the employer interviewed the U.S. worker; if appropriate, the reason(s) the employer did not interview the employee; the specific lawful job related reason(s) the U.S. worker was rejected; and how the U.S. worker was informed he or she did not qualify for the job opportunity. Also include information that documents the employer contacted the applicant(s) by phone (telephone logs), e-mail (dated copy of electronic transmission) and/or by mail (copy of letter sent to applicant(s) along with a copy of certified mail/"signed" green return receipt card).

(AF 795) (emphasis added).

The CO's additional audit request required a detailed report of the recruitment results, beyond that required in the boilerplate section of the audit notification. The Employer, in its audit response, failed to file a report with the level of detail required by the CO. The Employer in its recruitment report did not include the required dates it contacted the applicants, or the dates of the interviews with the applicants. (AF 91). In fact, there was no suggestion at all that there was more than one interview that occurred. (AF 91). The Employer simply stated that "[e]ight candidates were interviewed in person at schools with openings" and "[a]ll eight declined to work with those student populations." (AF 91). The audit request also required "information that documents the employer contacted the applicants." (AF 795). The Employer submitted documentation showing the date of the initial interviews in January 2011,[2] but there was no documentation establishing contact with applicants following this initial interview. (AF 115-46).

Based on the recruitment report and evidence provided on audit, it appeared that the reference to an "in-person" interview in the recruitment report was the same interview for which the interview notes were provided.[3] These notes indicated that the applicants were available for the position (and therefore presumably interested in the position). (AF 115-46). There was no information, in the recruitment report, or the documents provided, to suggest there were two separate interviews that occurred, or that it was in a second interview that the applicants showed their disinterest in the position. The failure on the part of Employer to adequately respond to the audit by indicating the dates of contact and dates of interviews in its report, and failure to provide documents showing contact with applicants, created a conflict between the recruitment report stating the applicants did not want to work with the student populations, and the submitted interview notes which indicated that the applicants were readily available for the position. Based on the conflict in the audit response, the CO correctly found that the Employer did not adequately provide lawful reasons for rejection of the eight applicants.

On reconsideration, the Employer submitted a letter from Mr. Ianniello, which expands upon the Employer's reason for rejection of the eight applicants. (AF 42-43). The letter states, in regard to the eight applicants:

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[2] This date should have also been included in the report itself, per the audit request.

[3] The notes did not indicate whether the interview was over the telephone or in person, nor did they indicate that it was an initial screening interview. (AF 115-46).

> For qualified applicants who reach the interview stage, NYCDOE generally has a two-step process. First, we conduct an initial phone screening. The interview notes produced with our audit response are from this initial phone screening. The second step is an in-person interview at individual schools with openings. During this interview, applicants have the opportunity to observe the environment and setting in which they would work, as well as to observe the student population.
>
> In this case, for the position of ESOL Teacher, we had eight qualified applicants who had an in-person interview after their initial phone screening:
>
> - Vibha Dogra
> - John Dora
> - Martin Howfield
> - Rosa Kalomiris
> - Mirla Mercado
> - Denise Ranelli
> - Cornelia Sabin
> - Sakina Waldrip-Brutus
>
> As explained in our Recruitment Report, during this second round of in-person interviews, all eight of these applicants declined to work with the student population and, as a result, stated that they were no longer interested in the position. For this reason, we rejected their applications.

(AF 42-43).

Under Section 656.24(g)(2), for applications submitted after July 16, 2007, the type of evidence that can accompany a motion for reconsideration is limited to the following:

> (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
>
> (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

Thus, an employer may only submit new evidence with its motion for reconsideration if it did not have a prior opportunity to submit the evidence before the denial. 20 C.F.R. § 656.24(g)(2)(i)-(ii); *see Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-628, PDF at 15 (Nov. 16, 2010). As such, if the employer failed to initially provide in its audit response a document requested by the CO, the employer cannot remedy the omission by including the document in its request for reconsideration. Furthermore, on appeal, BALCA can only consider

evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i), 656.27(c).

The original confusion in this matter that led to the CO's denial letter, stems from the fact that the Employer did not explain in the original recruitment report that there were two interviews with the eight U.S. applicants, the first interview being a telephonic screening interview, for which the Employer submitted notes on audit, and a second, in person interview, following which the applicants indicated they were not interested in working with the student population. The purpose of Mr. Ianniello's letter on reconsideration was to explain that there were two separate interviews. However, the audit request required a detailed report of the recruitment results, including the specific reasons for rejection of qualified U.S. workers, the dates of contact with the U.S. applicants, and the dates of interviews with the applicants. (AF 795). We find the letter from Mr. Ianniello contains information that should have been provided in the initial report, i.e. a detailed explanation that there was a <u>second</u> interview following the first screening interview in which the applicants showed disinterest in the position, and therefore the Employer is barred from submitting the information on reconsideration under Section 656.24(g)(2).

Although we find that the letter is barred by Section 656.24(g)(2), case law establishes that if a CO chooses to consider the evidence, it becomes part of the record before us on appeal. *See Almstead Tree & Shrub LLC*, 2011-PER-01569, PDF at 2-3 (Dec. 22, 2011); *Hellmuth Obata + Kassabaum, Inc.*, 2011-PER-00240, PDF at 4 (Dec. 14, 2011); *Take Solutions, Inc.*, 2010-PER-00449, PDF at 2 n.2 (Sept. 8, 2010); *see* 20 C.F.R. § 656.27(c). The CO in his transmittal letter wrote the following:

> The employer submits a copy of an undated letter from the Executive Director of Operational support services in the New York City Department of Education confirming rejection of the eight candidates who interviewed for the job opportunity. However, in the interview reports, in the employer's recruitment report, dated 1/13/2011 and 1/14/2011, the applicants were asked if you were chosen for the position, when would you be available? The eight (8) applicants responded either with "immediately" or "soon". Therefore, the employer's recruitment report did not provide the lawful job-related reason for rejection of U.S. applicants who appear to be willing, qualified and available.

(AF 1). It is not entirely clear whether the CO analyzed and considered the sufficiency of Mr. Ianniello's letter on reconsideration. However, given that the CO acknowledged Mr. Ianiello's letter and did not make any statement that he would not accept the letter because it was barred by Section 656.24(g)(2), we find that a reasonable interpretation of the transmittal letter is that he actually reviewed Mr. Ianniello's letter on reconsideration. *See Clearstream v. Banking S.A.*, 2009-PER-00015, PDF at 5 (Mar. 30, 2010); *Inovis*, 2010-PER-01619, PDF at 2-3 n.5 (Apr. 3, 2012). Thus, we find the documentation was within the record upon which certification was denied, and is therefore within the record that the Board must consider on appeal. *See* 20 C.F.R. § 656.27(c).

The letter from Mr. Ianniello resolves the original confusion that led to the CO's denial of certification. Specifically, Mr. Ianniello stated that there was a second, in person interview following an initial screening (for which the interview notes were provided), in which the eight U.S. applicants stated they were not interested in working with the student populations. A lack of interest on the part of the applicant is a lawful reason for rejection. *See New Consumer Products*, 1987-INA-00706 (Oct. 18, 1988) (en banc); *Kamashian Eng'g*, 1990-INA-00408 (Feb. 6, 1992). Accordingly, based on the letter from Mr. Ianniello, we find the Employer has established a lawful reason for rejection of the eight U.S. applicants,[4] and hereby REVERSE the CO's denial of certification in this matter.

## ORDER

It is **ORDERED** that the denial of labor certification in this matter is hereby **REVERSED** and the CO is directed to **GRANT** certification in this matter.

For the Panel:

Digitally signed by Colleen Geraghty
DN: CN=Colleen Geraghty,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Boston, S=MA, C=US
Location: Boston MA

**COLLEEN A. GERAGHTY**
Administrative Law Judge

[4] We note that the letter on reconsideration again fails to identity the specific dates of contact with the applicants and the dates of the interviews as originally required in the audit. Further, the Employer never complied with the audit by providing evidence documenting the dates of contact with applicants, aside from the January 2011 interview notes. However, because the CO did not deny the application based on a substantial failure to comply with the audit request pursuant to 20 C.F.R. § 656.20(b), we cannot reverse on that basis.

**NOTICE OF OPPORTUNITY TO PETITION FOR EN BANC REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc consideration is necessary to secure or maintain uniformity of the Board's decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.